Supreme Court, U.S.
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NO. 97-1100

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ROY L. WONDER, ET AL.,
Petitioners,
v.
LANRIC HYLAND,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was it clearly established in 1989 that a City could not deprive a person of valuable governmental benefits, including his full-time volunteer position which was intended to lead to permanent paid employment, and his access to public buildings, by retaliating against him for his speech on a matter of public concern?

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STATEMENT OF THE CASE

1. *Facts.* After his conviction of a felony and imprisonment, respondent Lanric Hyland earned a graduate degree in criminal justice and gained experience in the corrections field (Pet.App. 40). In May 1987 Hyland began work under petitioner Dennis Sweeney, the Chief Probation Officer of the San Francisco Juvenile Probation Department (JPD). Hyland was issued a department identification card designating him "Special Assistant to the Chief Probation Officer". He had a desk, a phone, and a set of keys (Pet.App. 38).

Hyland's employment with petitioners was to last until Hyland could obtain a pardon from the Governor of California and thus be appointed to a permanent position in the JPD (Pet.App. 2-3; E.R 96-97).[1] Hyland promised to work full time. Petitioners promised to make their best efforts to obtain compensation for him (*id.*). Sweeney promised he would help Hyland obtain a pardon (Pet.App. 40). Hyland was paid for his work from October 1987 to June 1988. For the remainder of his employment, Hyland served without pay (Pet.App. 2-3).

Through February 1989 petitioners considered Hyland an exemplary employee (E.R. 73). Three judges of the Superior Court wrote the Governor recommending a pardon and noting Hyland's contributions to the criminal justice system (E.R. 19-20). Sweeney and his subordinate,

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[1] "E.R." refers to the Excerpts of Record filed in the Court of Appeals on this appeal.

petitioner Dennis LaPlante, wrote similar recommendations, and commended Hyland 's work for the JPD (E.R. 21-22). The Board of Prison Terms and the California Supreme Court unanimously recommended a pardon, and the pardon application was under consideration by the Governor (E.R. 99).

In February 1989, following threatened legal action by the United States Department of Justice and another entity over conditions at Juvenile Hall, and findings by the California Youth Authority that Juvenile Hall failed to meet minimal standards required by state law (E.R. 89; Pet.App. 39), Hyland drafted an eight page memorandum to three Superior Court judges addressing various shortcomings at Juvenile Hall and attributing them to LaPlante 's deficient performance. The memorandum did not discuss any of Hyland 's personal employment interests or status (E.R. 11-18). Petitioners fired Hyland in retaliation for his memorandum (Pet.App. 40). At that time, petitioners were in the process of obtaining additional funds to pay Hyland (E.R. 96).

Thereafter Sweeney called a newspaper reporter to retaliate against Hyland and disclosed his prior felony conviction (Pet.App. 40). Sweeney called the office of the Governor and demanded that Hyland not be granted a pardon. He falsely alleged both to the Governor 's office and later on television that Hyland had unethically released to the public confidential juvenile court information. The pardon application was denied (Pet.App. 40-41).

After his dismissal Hyland obtained paid employment with the National Center on Institutions and Alternatives ("NCIA"), a private entity. His job was to interview juvenile detainees and write private pre-sentencing reports. Because of his February 1989 memorandum petitioners denied Hyland access to Juvenile Hall, and as a result the NCIA terminated Hyland's work on cases in the San Francisco Juvenile Court (Pet.App. 41-42). Hyland's applications to certain positions in the City government also were not considered because of his memorandum (Pet.App. 42-43).

2. *Legal Proceedings.* Hyland sued in 1990. The District Court ruled that Hyland's speech was not protected by the first amendment (Pet.App. 6). The Court of Appeals reversed. It held that the First Amendment prevented the City from depriving Hyland of a valuable governmental benefit, including his volunteer position, in retaliation for his speech on a matter of public concern (Pet.App. 7-19). The Court of Appeals remanded for a determination by the District Court whether Hyland's memorandum was sufficiently disruptive to justify Hyland's dismissal despite the protected content of the speech (Pet.App. 19-21). *Hyland v. Wonder,* 972 F.2d 1129, 1139-40 (CA9 1992), *cert. denied,* 508 U.S. 908 (1993) (*"Hyland I"*).

On remand, the District Court, instead of deciding the issue specified by the Court of Appeals, ruled that petitioners were entitled to qualified immunity because the first amendment rights of volunteers were not clearly established in 1989 (Pet.App. 84). A unanimous panel of the Ninth Circuit (Judges Sneed, Boochever and Thompson)

reversed. Relying upon several decisions of this Court, as well as earlier Ninth Circuit rulings, the panel concluded that it was clearly established in 1989 that government officials could not deprive Hyland of a valuable governmental benefit, including his volunteer position, for his speech on a matter of public concern (Pet.App. 45-52). The panel also rejected the petitioners ' argument that, because there was no prior Supreme Court or Ninth Circuit decision dealing specifically with the rights of volunteers, the right Hyland alleged could not have been clearly established in 1989. The panel relied upon the teaching of *Anderson v. Creighton,* 483 U.S. 635, 640 (1987), that a qualified immunity defense is not available if the unlawfulness is apparent in light of previous precedent, even if the very action in question has not been ruled unlawful (Pet.App. 50). Applying *Anderson,* the panel concluded that it would have been apparent to a reasonable governmental official in 1989 that he could not deprive Hyland of his position and other benefits because of his speech (Pet.App. 50-51).

The panel also ruled that petitioners were not entitled to qualified immunity for retaliating against Hyland after his discharge, at a time when Hyland was a private citizen and not a government employee (Pet.App. 52).

Petitioners ' petition for rehearing by the panel was denied, and their suggestion to the full court for rehearing in banc was rejected without a dissenting vote (Pet.App. 37).

REASONS FOR DENYING THE WRIT

The Court of Appeals' qualified immunity ruling breaks no new ground, and is supported by decisions of this Court. It has been settled for decades that the government may not deprive a person of a valuable benefit for his speech. It is also settled that qualified immunity is not available where, even though the precise action at issue has not been definitively decided, existing law makes the unlawfulness of a course of action apparent. The Court of Appeals merely applied these established legal principles to the unusual facts of this case. While the application of settled principles to particular facts rarely justifies review by this Court, the result reached below was in fact correct. There are no conflicts between the decision below and those of other Circuits, and no other issues presented worthy of further review.

I. THE COURT OF APPEALS' QUALIFIED IMMUNITY RULING IS SUPPORTED BY SETTLED PRINCIPLES AND RAISES NO ISSUES WARRANTING REVIEW.

A. Petitioners have overlooked the decisions of this Court which support the decision below. As explained in *Perry v. Sinderman,* 408 U.S. 593, 597 (1972):

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit . . . the government . . . may not deny a benefit to a person on a basis that infringes his constitutionally protected

> interests -- especially, his interest in freedom of speech."

The fact that a teacher had no contract or tenure security is "irrelevant to his free speech claim." *Id.* at 599. The Court also has made clear that government benefits other than employment could not be denied because of an individual's speech. *E.g., Speiser v. Randall,* 357 U.S. 513, 526 (1958) (tax exemptions); *Sherbert v. Verner,* 374 U.S. 398, 404 (1963) (unemployment benefits); and *Shapiro v. Thompson,* 394 U.S. 618, 627 n. 6 (1989) (welfare benefits). *Accord, e.g., Elrod v. Burns,* 427 U.S. 347, 359-360 n.13 (1976) (rights are unconstitutionally infringed "both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason"); and *Shelton v. Tucker,* 364 U.S. 479, 488-490 (1960) (government may not alter the employment status of a public employee for exercising first amendment guarantees).

Ten years before the events involved here, the Second Circuit implicitly concluded that the loss of a volunteer position supported a free speech claim. *Janusaitis v. Middlebury Volunteer Fire Department,* 607 F.2d 17, 25 (CA2 1979). In 1977 the Ninth Circuit held that a transfer of a teacher to another school, with no loss of pay or status, was actionable under the first amendment, and suggested that the deprivation of any other benefit which was not truly *de minimis* also would be actionable. *Bernasconi v. Tempe Elementary School District No. 3,* 548 F.2d 857, 860 (CA9 1977), *cert. denied,* 434 U.S. 825 (1977). In the 1980s the Ninth Circuit held in several contexts that a public

employee had a free speech claim where he had suffered adverse effects on some conditions of employment, even though he had not suffered the loss of his job or any salary. *Manhattan Beach Police Officers Ass'n., Inc. v. City of Manhattan Beach,* 881 F.2d 816, 819 (CA9 1989), and cases cited therein. In 1978 this Court held that a plaintiff in an action under *42 U.S.C. § 1983* could recover for the mere emotional distress caused by a due process violation. *Carey v. Piphus,* 435 U.S. 247, 262-64 (1978). In 1986 the Court indicated that a plaintiff suffering a first amendment violation could recover for such non-monetary injuries as impairment of reputation, personal humiliation, and mental anguish and suffering. *Memphis Community School District v. Stachura,* 477 U.S. 299, 307 (1986), citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

Qualified immunity is not available if the unlawfulness of an official's conduct is apparent, even though the very action in question has not been held unlawful. *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). *See United States v. Lanier,* ___ U.S. ___, ___, 117 S.Ct. 1219, 1227-28 (1997) (despite notable factual distinctions, prior decisions gave reasonable warning that the conduct at issue violated constitutional rights). In 1989 any reasonable official in California -- or any other state -- would have known that it was unlawful to take away Hyland 's volunteer position -- or any meaningful lesser benefit -- for his free speech on a matter of public concern. Further, whether or not petitioners ' actions are sufficient to support a First Amendment claim under the highly unusual facts present here does not raise a question of general importance warranting certiorari.

B. The legal issue which petitioners attempt to pose (Pet.App. i) -- whether the First Amendment rights of volunteers were clearly established in 1989 -- is not squarely presented here. Insofar as it is based on the termination of his employment at the JPD, Hyland's claim is for much more than the loss of a volunteer position. Unlike firefighters or some other volunteers, Hyland did not agree to work for free. In return for Hyland's promise to work full time, petitioners agreed to use their best efforts to obtain compensation for him, to help him get a pardon, and then to appoint him to a permanent paid position in the JPD. Hyland was paid $19,900.19 during eight months of his employment (E.R. 70). Although Hyland had not received pay since June 1988, petitioners were in the process of obtaining another grant to pay him when he was terminated (Pet.App. 96). Unlike a mere volunteer, Hyland was actually an employee temporarily in a non-pay status who was working under a promise of permanent paid employment.

Further, after the discharge, petitioners engaged in a campaign of retaliation against Hyland, gratuitously causing the denial of his pardon application. They also deprived him of his subsequently obtained private, paying employment with the NCIA. There is no reasonable basis upon which petitioners could have believed that such retaliation against a *private citizen* was lawful.

C. The implicit premise of petitioners' argument is that the Court of Appeals extended the first amendment rights of employees to volunteers. The premise is mistaken. Instead of expanding Hyland's rights, the Court of Appeals' ruling narrows them by giving petitioners the same defenses to liability available in suits by government employees.

Private citizens enjoy the broadest possible scope of First Amendment protections. They are free to level the most vigorous criticisms, on matters of public and private concern, without fear of punishment. *See Boos v. Barry,* 485 U.S. 312, 322 (1988), *citing Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 56 (1988). Free speech protections are at their zenith when private citizens attack the government. *E.g., Carey v. Brown,* 447 U.S. 455, 467 (1980). *Connick v. Myers,* 461 U.S. 138 (1983), holds that public employees have *narrower* First Amendment rights than private persons. "Private citizens cannot be punished for speech of merely private concern, but government employees can be fired for that reason." *Rutan v. Republican Party of Illinois,* 497 U.S. 62, ___, 110 S.Ct. 2729, 2748 (1990) (Scalia, J., dissenting, citing *Connick, supra,* 461 U.S. at 147). Even employees who speak on matters of some public concern can be disciplined if the speech seriously disrupts the employer-employee relationship, *Connick*, 461 U.S. at 150.

If Hyland is deemed a private citizen, then it was clear in 1989 that the government could not impose even the mildest sanctions on him for free speech. If Hyland is deemed the functional equivalent of an employee subject to the *Connick* defenses, then he had the same clearly established free speech rights that all employees have enjoyed since before *Connick.* In *either* case, Hyland 's free speech rights were clearly established by 1989.

D. That this Court did not resolve a conflict among circuits by holding that private government contractors cannot be sanctioned for free speech until *Board of County Commissioners v. Umbehr,* ___ U.S. ___, 116 S.Ct. 2342 (1996), does not mean that Hyland 's rights were uncertain in 1989. In 1977 the Court held unequivocally

that a terminated probationary employee with no property interest in continued employment could maintain a First Amendment claim. *Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S. 274, 283-284 (1977). *Accord, Rankin v. McPherson,* 483 U.S. 378, 383-384 (1987). *See Perry, supra,* 408 U.S. at 597 (free speech protected "regardless of public employee 's contractual or other claim to a job"). There is no legitimate distinction between the position of Hyland, who received some pay and a promise of permanent employment, and that of a probationary employee with no claim to a job. *See* cases cited *infra,* pp. 6-7. Nor is there any basis for petitioners ' contention (Pet. 9) that, because the District Court ruled that they were entitled to qualified immunity, the Court of Appeals should not have reversed (petitioners assert they should not be held to a higher standard of constitutional scholarship than the District Court). This argument is foreclosed by the Court 's holding in *Elder v. Holloway,* 510 U.S. 510, 516 (1994), that an official's claim to qualified immunity presents a question of law reviewable de novo on appeal.

CONCLUSION

Certiorari should be denied.

Respectfully Submitted,

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